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No. 99-_____

IN THE

SUPREME COURT OF THE UNITED STATES

THE CHEVY CHASE LAND COMPANY OF MONTGOMERY COUNTY, MARYLAND,

Petitioner,

v.

UNITED STATES; MONTGOMERY COUNTY, MARYLAND and COLUMBIA COUNTRY CLUB,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) May a court re-define a property interest, using new legal principles, to reject a constitutional takings claim?

(2) Where petitioner originally conveyed only a right of way easement to a railroad, was the property of the petitioner taken when the government appropriated the property for a recreational trail and/or other uses not intended when the easement was conveyed?

(3) Where the railroad to whom petitioner conveyed a right of way easement abandoned that easement, was the property of the petitioner taken when the government thereafter appropriated the property for its own use?

LIST OF PARTIES

The parties to the case below were the Petitioner, The Chevy Chase Land Company of Montgomery County, Maryland; the United States; an intervenor defendant-appellee, Montgomery County, Maryland; and an intervenor plaintiff-appellant, Columbia Country Club. Amicus briefs were also filed in the Court of Federal Claims and before the Maryland Court of Appeals by the Rails-to-Trails Conservancy.

CORPORATE DISCLOSURE STATEMENT

The Chevy Chase Land Company of Montgomery County, Maryland has no parent corporation and no publicly held company owns 10% or more of its stock.

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The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit can be found at 1999 U.S. App. LEXIS 32838. App. 1. The certification order is reported at 158 F.3d 574. App. 105.

The opinion on certified questions of the Maryland Court of Appeals is reported at 355 Md. 110 and 733 A.2d 1055. App. 8.

The opinion of the Court of Federal Claims is reported at 37 Fed. Cl. 545. App. 110.

STATEMENT OF JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Federal Circuit was entered on December 17, 1999. The subsequent order denying Petitioners' petition for rehearing en banc was entered on April 6, 2000. Review by writ of certiorari may be had in this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES

The Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use, without just compensation."

The Tucker Act, codified at 28 U.S.C. § 1491(a)(1), provides: "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution . . . ."

The most pertinent provision of 16 U.S.C. § 1247(d) is that "in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." The Appendix contains the full text.

STATEMENT OF THE CASE

In 1891, the Petitioner ("Land Company" or "CCLC") agreed to convey a right of way 100 feet wide and about a mile long to the Metropolitan Southern Railroad Company (the "Railroad"). The Railroad constructed a railroad over a portion of such right of way in 1892, completing the line in 1910. The Land Company conveyed the right of way to the Railroad by deed in 1911. Until 1985, the Railroad used the line to haul freight.

In 1985, the Railroad ceased railroad operations and, by corporate resolution, abandoned the line; in 1986, it applied for ICC approval of such abandonment; and, in 1988, it agreed to quitclaim any remaining interest in the property to Montgomery County. A quitclaim deed was given after the ICC issued a Certificate of Interim Trail Use ("CITU") on December 14, 1988, authorizing the County to implement "interim trail use." The CITU precluded the Land Company from using its unencumbered fee interest in the property, by operation of 16 U.S.C. § 1247(d), which requires trail use to be deemed a non-abandonment of railroad use. The County instituted a recreational trail in 1996.

The Land Company brought this action on April 8, 1992 under the Tucker Act, 28 U.S.C. § 1491, contending that the Railroad had received an easement, that the Railroad had abandoned such easement prior to the transfer to Montgomery County, and thus that the CITU operated to take the Land Company's property.

The Court of Federal Claims granted summary judgment to the defendants, holding that the Land Company had conveyed to the Railroad fee simple title, rather than an easement. The CFC, however, also opined that if the interest conveyed was an easement, such easement was abandoned under state law and thus that the operation of Section 1247(d) "effected a *per se* physical taking of CCLC's property." App. 189.

On appeal, the Federal Circuit panel certified three issues to the Maryland Court of Appeals: (1) whether the interest conveyed to the Railroad was a fee simple or an easement, (2) the scope of the easement, and (3) whether the easement had been abandoned. App. 108. The Maryland court ruled that the interest given by the Land Company had

been an easement. App. 16-37. However, it deemed such easement to "legally" encompass recreational trails (App. 47-48), and held that no such easement could be abandoned, so long as abandonment was inconvenient to the purposes of federal trail promotion (App. 70-71, 77 & 82). Judge Cathell, in dissent, disagreed with the scope of use holding (App. 102) and strongly criticized the abandonment holding, indicating that it was a "drastic departure" from accepted Maryland legal doctrines and that it "adds a new element, final regulatory approval, to the centuries-old Maryland law of abandonment of easements by merely stating that it is so." App. 103.

While the Land Company would have prevailed had the Federal Circuit rejected either the scope of use or abandonment analysis of the Maryland Court of Appeals, the subsequent Federal Circuit panel decision adopted the Maryland majority's result without addressing the underlying issues (App. 6):

> The Court of Appeals' answers to the certified questions, which we accept, state that the current recreational trail use of the easement is a permissible use, no acts of abandonment of that use being shown. Consequently, . . . [CCLC] cannot show a property interest that has been impermissibly taken.

The Land Company sought rehearing en banc, contending that the panel had effectively defined the Land Company's property interest in terms irreconcilable with 1911 principles. The Federal Circuit denied the petition. App. 226.

ARGUMENT FOR ALLOWANCE OF THE WRIT

Summary

The 1992 decision of this Court in *Lucas v. South Carolina Coastal Council* made clear that the property interest of a takings claimant is to be defined pursuant to "background principles" of state law. The courts have since struggled to resolve which property law principles are part of the appropriate definitional "background," including whether a statute can be part of the "background principles" and at what relevant point in time should a court assess the status of the "background principles" underlying the interest of a particular property owner. This case squarely raises the most fundamental possible "background principles" issue: whether a court can simply ignore prior law and re-define the property owner's interest as not including the rights claimed by the government. If courts are free to define property interests as did the Federal Circuit in this case, the Takings Clause is no longer a relevant limit on governmental power over private property.

The only prior case before this Court that came close to presenting the issue in such stark terms was *Stevens v. City of Cannon Beach*, as to which Justices O'Connor and Scalia would have granted certiorari. This case is a far better vehicle to address those issues because *Stevens* had an inadequate factual record, while here all the relevant facts are stipulated. Moreover, *Stevens* at least involved a change to state law that occurred before the filing of that case, while here the relevant state law principles have been modified in the course of this case for the purpose of depriving parties like Petitioner of any compensation.

The manipulation of the relevant principles of state law that occurred in this case below was clear. Devoting Petitioner's property to governmental use was clearly a taking either if the Railroad's easement did not encompass recreational trail uses or if such easement was abandoned by the Railroad prior to its quitclaim deed to Montgomery County.

As to the easement scope, the Maryland cases have always held that easements are to be construed to give effect to the parties' intentions. The Maryland Court of Appeals conceded the parties intended the property to be used for a railroad and that "a recreational trail may not have been actually contemplated by the parties when the deed was conveyed in 1911," but ignored that intent, creating the legal fiction that freight railroads and recreational trails are "of the same nature."

As to abandonment of the easement, the Maryland Court of Appeals created a new rule of state law that actions consistent with trails use under federal regulations are disqualified as evidence of abandonment. The Federal Circuit purported not to rely on the Maryland court's consideration of abandonment. Absent adoption of the Maryland court's analysis, however, the Federal Circuit failed to explain why it did not find a taking based on the Court of Federal Claim's determination that the easement was abandoned more than two years prior to the quitclaim to Montgomery County.

The need for the Court's intervention is particularly acute in that the decision here was that of the Federal Circuit, which has exclusive appellate jurisdiction over all Tucker Act takings claims against the United States.

Argument

This case raises the issue left unresolved in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and in *Preseault v. I.C.C.*, 494 U.S. 1 (1990): what are the "background principles" of state law that provide the benchmark for any takings analysis? For the constitutional prohibition on uncompensated takings to have any meaning, it is as important to ensure that courts engage in an "objectively reasonable application" of the law as it has always been to ensure that legislatures do not, "by ipse dixit," transform private property into that of the public. *See, e.g., Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

I. The Proper Definition of Relevant State Property Law Has Become the Dominant Issue in Takings Cases

Over the past decade, three generic strategies for rejecting takings claims have been struck down, or severely impaired. Over that same period of time, and largely as a result of that evolution in takings doctrine, the precise definition of the underlying state law property interest has become the critical issue in many takings cases.

A. Federal preemption of state property rights rejected

The constitutionality of an exercise of 16 U.S.C. § 1247(d) to convert what would otherwise have been a lapsed railroad easement into a recreational trail came before this Court in *Preseault v. I.C.C.*, 494 U.S. 1 (1990). The petitioners in that case directly challenged the power of the

Interstate Commerce Commission to make such a conversion, arguing that the conversion effected an uncompensated taking. This Court held that the existence of a potential Tucker Act remedy provided compensation for any taking that was present and, therefore, that the challenged action was valid. The Court rejected the rationale of the Second Circuit that the property owner could not possess property rights inconsistent with federal regulatory authority. The concurring opinion of Justice O'Connor, joined by Justices Scalia and Kennedy, emphasized the importance of the predicate state property interest: "the existence of a taking will rest upon the nature of the state-created property interest that petitioners would have enjoyed absent the federal action and upon the extent that the federal action burdened that interest." 494 U.S. at 24.

B. "Noxious use" limitations on property rights rejected

Two years later, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court rejected the viability of the "noxious use" line of regulatory taking cases, at least where the government effectively has deprived the landowner of all economically beneficial use of his property. The *Lucas* opinion equated permanent physical occupations (such as is present here) and regulations that take all use of property, both of which it treated as *per se* takings. Such takings, *Lucas* indicated, may only be upheld where the proscribed property right was "not part of [the property owner's] title to begin with":

> Any [confiscatory regulation] cannot be newly legislated or decreed (without compensation) but must inhere in the title itself, in the restrictions that background principles of the State's law of property and

> nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts--by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

505 U.S. at 1027 & 1029.

Useful though these comments have been in the development of takings jurisprudence, they did not fully define which principles of state law existed in the "background" and which arose in the "foreground."[1] Subsequent cases have shown that courts remain deeply divided over the relevant principles[2] and that advocates of

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[1] Indeed, the Court's comments in *Lucas* about the relevant limits of "the State's law of property and nuisance" could arguably be regarded as *dicta*, since the Court rejected the noxious use analysis originally applied by the South Carolina Supreme Court, merely remanding the case for further findings "not inconsistent" with its opinion.

[2] In addition to the cases discussed in Section II *infra*, *see, e.g.*, *Kim v. City of New York*, 90 N.Y.2d 1, 681 N.E.2d 312, 659 N.Y.S.2d 145, *cert. denied*, 522 U.S. 809 (1997) (4-2 decision in which majority and dissent differed sharply over whether city could rely on a City Charter provision to use a portion of plaintiff's property to furnish lateral support for a public road); *Colorado Dept. of Health v. The Mill*, 887 P.2d 993, 999-1002 & 1013-15 (Colo. 1994), *cert. denied*, 515 U.S. 1159 (1995) (majority and dissent differed over whether it was "unreasonable" for landowner to expect to continue to use former uranium mine tailings site, certified as safe by state); *Hunziker v. State*, 519 N.W.2d 367 (Iowa 1994), *cert. denied*, 514 U.S. 1003 (1995) (majority and dissent differed over whether state law preventing

broad governmental authority over property continue to invent theories pursuant to which present day governmental objectives manage to trump the original understandings and expectations of property owners. This Court recognized, in *Lucas*, the potential for manipulation of such issues, remarking, in a footnote:

> We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.

Id. at 1032 n.18 (emphasis in original).

C. Property owners' deemed foreknowledge of future regulation rejected

Immediately after the decision in *Lucas*, the primary governmental strategy for supporting takings, even in the *per se* takings arena, was to argue that the Court's reference to "background principles" of state law was merely a gloss on the "reasonable investment-backed expectations" test announced in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). In Rails-to-Trails cases, for example, the government argued that property owners should have expected, from the railroad status of their grantees, that some day such a regulated entity would become subject to the Rails-to-Trails Act, that the Act would deem trail use to be railroad use and that such Act would become a retroactive limitation on the grantor's reversion interest. *See, e.g.*,

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disturbance of Indian burials worked a taking when that prevented any construction on lot).

Preseault v. United States, 27 Fed. Cl. 69, 89 (1992); *Chevy Chase Land Co. v. United States*, 37 Fed. Cl. 545, 581 (1997) (App. 180-81).

The theory that all property owners are omniscient was dealt a serious, but perhaps not fatal, blow by the Federal Circuit's in banc decision in *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996). In that case, the court ruled, upon facts very similar to those present here, that the Preseaults' property had been taken by operation of 16 U.S.C. § 1247(d). In the process, it "rejected categorically" the government's attempt to interject "reasonable expectations" concepts into physical occupation cases. *Id.* at 1540.

D. State law issues are the current battleground

Notwithstanding the rulings of this Court in *Preseault* and *Lucas* and the in banc decision of the Federal Circuit in *Preseault*, striking down three different theories for defining property interests as inherently subject to governmental authority, the impulse to remold legal concepts to justify governmental objectives has not disappeared, but has merely switched focus to the underlying issues of "state law."

By shifting the takings fulcrum to issues of state law, this Court may have inadvertently encouraged federal courts to consider enforcement of the Fifth Amendment prohibition on uncompensated takings to no longer be part of their primary responsibility. For example, the Federal Circuit in this case certified issues to the Maryland Court of Appeals, despite the existence of abundant Maryland precedent on the relevant issues, and then declined to examine the reasoning of the Maryland court upon receipt of the answers. Such a

mechanical approach by the federal appellate court with unique authority over takings cases fails to appreciate that, under the principles announced by this Court in *Lucas*, proper assessment of the status of state law is the key step in a takings analysis. Since determining the existence of a taking is a federal issue, it may not be delegated by a federal court to a state court.

II. *Post Hoc* Property Principles Should Not Trump The Takings Clause

It was the Federal Circuit's responsibility to evaluate Petitioner's taking claims based on what the Land Company's property interest was in 1911, when it gave the Railroad an easement, and not what that interest was in 1999, after the Maryland Court of Appeals announced new legal principles designed to facilitate recreational trails. Upon receipt of the answers of the Maryland Court of Appeals, however, the Federal Circuit abdicated that responsibility. The Federal Circuit treated the "background principles" of state law as including *post hoc* rules without prior basis in state law simply because a state court was the entity that announced such rules. Such an approach eviscerates the Tucker Act's role of protecting the people from uncompensated takings. Permitting a state court (or a federal court purporting to apply state law principles) to resculpt state property law in the context of a takings case "threatens to read the Just Compensation Clause out of the Constitution." *See Preseault*, 494 U.S. at 23 (O'Connor, J., concurring).

This Court having eliminated alternative arguments with broad applicability, governmental entities in search of a bootstrap argument sufficient to justify all manner of takings have now turned to redefining state property law. If they can convince a court, even retroactively, to deem the law to

contemplate the use the government would like to make of the land, all takings issues magically disappear. Property owners, however, lose thereby the stability promised by the Takings Clause. If they convey a railroad easement (or, to update the example, a scenic easement), they cannot be confident that the scope of that grant will be what they intended. Latter day legislatures or courts with expansive views of the public weal may choose to construe that grant much more broadly than could have been anticipated when the grantor acted. Property owners will thereby be discouraged to convey such easements for little or no consideration (as did the Petitioner here), or perhaps at all, since what appeared to be a limited purpose may some day come to be the equivalent of fee simple. Such a chilling effect on conveyances may prove to be more of a detriment to the public than the benefits activist courts and legislatures contemplate when they authorize appropriation of property at the expense of individual property owners.

More fundamentally, however, such malleability in the concept of property is inconsistent with the compact struck between the people and the government in the form of the Takings Clause. If the government would like to have a public park with recreational trail (and what government wouldn't?), it should pay for the necessary land, whether owned by a railroad, a reversionary property owner, or someone else.

Given the plenary jurisdiction of the Federal Circuit over takings cases against the United States under the Tucker Act,[3] the need is clear for this Court's intervention to state

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[3] Tucker Act cases may only be brought in the Court of Federal Claims and may only be appealed to the Federal Circuit. *See* 28 U.S.C. §§ 1491(a)(1) & 1295(a)(3).

precisely, and in dispositive fashion, the obligations of a court when evaluating state property law for purposes of a takings claim. That need is underscored by the other courts who have shown themselves susceptible, despite the guidance contained in *Preseault* and *Lucas*, to misconstrue the nature of a proper takings analysis. Exhibit A, of course, is the Maryland Court of Appeals. Even though it knew the context in which the Federal Circuit had asked for its views, it felt completely unconstrained in reshaping the contours of Maryland property law, as Judge Cathell complained in dissent (App. 103-104):

> In my view, the majority's position is result-oriented. I have no quarrel with the idea that unused railroad rights-of-way are potential resources for recreation and environmental protection. The elements of the law of abandonment are, in substantial part, judge-made law and, while I do not advocate such an approach, this Court presumably has the power to impose prospectively an additional element in respect to the doctrine. Instead of imposing a new, prospectively applicable element, however, the majority holds that this new element, approval of federal agencies, has always been part of the Maryland law of abandonment. That simply is not so.

Another example of a court that appeared to consider itself free to use recent innovations in property law concepts to define away takings claims was the decision by the Oregon Supreme Court in *Stevens v. City of Cannon Beach*, 317 Or. 131, 854 P.2d 449 (1993), *cert. denied*, 510 U.S. 1207 (1994).[4] The court there considered a 1969 case to create an inherent limitation on the title of persons who

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[4] *Cf.* cases cited at 9, n.2 *supra*.

purchased their property in 1957. The 1969 case announced a new Oregon "doctrine of custom" (alleged to be a previously unnoticed aspect of English common law) appropriating the dry sand area of oceanfront beaches to public use. As Justice Scalia, joined by Justice O'Connor, noted in dissenting from the denial of a writ of certiorari: "To say that this case raises a serious Fifth Amendment takings issue is an understatement." 510 U.S. at 1212. Unfortunately, the factual predicate for a full review of the takings issue was not present in that case. *Id.* at 1213.

Here, in contrast, there is not only a full record, but the essential facts were agreed between the parties, and only the legal consequences of those facts are in dispute. *See* 158 F.3d at 576 (App. 108); Md. Ct. App. at 4 (App. 12).

III. The Federal Circuit Did Not Apply Established Maryland Law To Determine the Scope of the Easement

This case squarely presents the issue of *post hoc* transformation of state property law in order to defeat a takings claim. The Federal Circuit adopted the Maryland Court of Appeals' ruling that the Railroad's easement encompassed recreational trails. Doing so failed to apply 1911 Maryland law in two primary respects. First, it ignored the intent of the grantor and the circumstances of the parties at the time of the conveyance, which has been the primary focus of Maryland cases construing easements since well before 1911. Second, it gave dominant weight to promotion of "public transit use," which is a newly-minted principle of easement deed construction in Maryland.

A. The intent of the parties

The Maryland Court of Appeals conceded that the intent of the parties governs deed construction generally and easement construction specifically. It conceded that the parties here intended a railroad use for the easement. It further conceded that "a recreational trail may not have been actually contemplated by the parties when the deed was conveyed in 1911." Yet it held that the "use of the right-of-way as a public trail was legally contemplated by the parties to the 1911 deed and is of the same nature as the public railway in existence for some 90 years." App. 47-48 (emphasis added). In other words, it held that the parties' actual intent was irrelevant and that it intended to adopt a legal fiction, equating trails and freight railroads. No prior Maryland case had adopted such a principle.

It has long been the law in Maryland that "where a right of way is granted . . . the way-owner is only entitled to the necessary and reasonable use of the way for the purposes for which it was granted." *Millson v. Laughlin*, 217 Md. 576, 587, 142 A.2d 810, 816 (1958) (quoting *Frank v. Benesch*, 74 Md. 58, 59-60, 21 A. 550, 550 (1891)). In determining the "purposes for which it was granted," the court is to "ascertain and give effect to the intention of the parties at the time the [easement was created]," viewing "the language employed in light of all the facts and circumstances of the transaction." *Buckler v. Davis Sand & Gravel Corp.*, 221 Md. 532, 537, 158 A.2d 319, 322 (1960); *Desch v. Knox*, 253 Md. 307, 310, 252 A.2d 815, 817 (1969); *Brown v. Reeder*, 108 Md. 653, 657, 71 A. 417, 419 (1908) (grantor's intent especially important). *See* Md. Ct. App. Op. at 9 (App. 16).

When considering whether an easement or fee was conveyed to the Railroad, the Maryland Court of Appeals readily found the parties' railroad intent to be obvious from the circumstances:

> [T]he railway for which the conveyance was executed had already been built and was in operation for nearly 20 years prior to the 1911 conveyance. Thus, unlike the right-of-way deeds examined in our prior cases, and unlike the land company's deeds to other railroads, the 1911 deed did not convey an undeveloped railroad corridor but rather a railway that had been in existence for quite some time. *As a result, there was little need to state in the deed the purposes for which the right-of-way was conveyed.* Regardless, contrary to the intimations of appellees and the CFC, our prior cases have never stated that a right-of-way deed must include purpose language. Rather, we have looked to the circumstances and positions of the parties. In this case, the fact that *both parties to the deed were well aware that the right-of-way was to be used for a freight and passenger railroad that had been in operation for many years overcomes any need for limiting language in the deed itself* for purposes of creating an easement as opposed to an estate in fee simple absolute.

App. 30-31 & 37 (emphasis added; there was no passenger service on the railroad (JA219, 456)). The court then pointed out the consistency of an easement interpretation with the 1891 Agreement between the Land Company and the railroad, which was rife with railroad-oriented language. *Id.* at 31-32.

However, the Maryland Court of Appeals refused to consider this exact same evidence when construing the scope of the easement. It also failed to take into account the railroad's only permitted corporate purpose being: "constructing and operating a railroad in the County of Montgomery" and the freight railroad-oriented motivation of the Land Company, such as the Land Company's having received half-rates on transport of building materials and having required the Railroad to allow it a coal siding for its power plant. *See* JA147, 182, 185-87. There is no basis in prior Maryland law for giving effect to the intentions of the parties in determining whether an easement has been given, but not in determining what purpose the easement was meant to serve. The issues are inherently interrelated since an intent to limit the interest given is what distinguishes an easement from a fee simple interest. *See* App. 19-20.

B. Promotion of public transit uses

Maryland easements have never been flexible property interests. Grants of easements are strictly construed, since they are "designed to confer rights and impose obligations which otherwise would have no existence." *Buckler v. Davis Sand & Gravel Corp.*, 221 Md. 532, 538, 158 A.2d 319, 323 (1960). A change in conditions, such as a decline in the need for freight railroad service and a new public desire for recreational trails, has not been considered to enlarge the rights of the grantee:

> We are dealing with rights, and not questions of desirability, and we cannot give the appellees more than they are legally entitled to because it would be convenient for them to have it.

Burroughs v. Milligan, 199 Md. 78, 89-90, 85 A.2d 775, 781

(1952) (road about 10 feet in width cannot be enlarged to 20 feet due to grantee having developed a residential subdivision). Even where grants of easements are initially vague, such as where the location of the way is unstated, once those rights have been defined by use, they cannot thereafter be changed without the mutual consent of the parties. *See, e.g., Sibbel v. Fitch*, 182 Md. 323, 327-28, 34 A.2d 773, 774-75 (1943); *Stevens v. Powell*, 152 Md. 604, 608, 137 A. 312, 313 (1927).

The Maryland Court of Appeals majority disregarded such principles, instead focusing on the potential public benefits it perceived in former railroad rights of way. App. 52-53, 43-44. The court resorted to a *non sequitur* in order to enlist the Land Company's property interest into the service of such policies: "[b]ecause the public nature of the railroad business was obvious at the time of the 1911 deed, we must assume that the land company knew that its grant was subject to reasonable accommodations for the public use . . . ."[5] App. 43. None of the highway cases cited by the majority so hold. Those cases merely held that when a property owner gives a highway (not railroad) easement, it can be presumed that the owner contemplates the general passage of the public over the highway and that, in that context, it is not an expansion of the easement if a street railway is later laid in the bed of the road. The rationale of the cases was that the street railway was just a technological improvement on the prior modes of transport, and that the easement continued to be used for general highway travel.

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[5] This reasoning is almost identical to the property-owner-is-presumed-to-know-the-future approach rejected by the Federal Circuit in *Preseault*. That the Federal Circuit was willing to accept such an analysis when it was put forward by the Maryland Court off Appeals further demonstrates that it is confused about the meaning of "background principles" of state law.

See, e.g., Baltimore Co. W. & Elect. Co. v. Dubreuil, 105 Md. 424, 430-32, 66 A.2d 439, 440-42 (1907). Such a rationale has no application to this case. Recreational trails are not a technological improvement on freight railroads and there has been no continuation of the railroad use, which ceased in 1985.

The Maryland Court of Appeals further reasoned that the easement encompassed recreational trails because such trails are not burdensome:

> It is self-evident that the use of the right-of-way as a transportation corridor for walking, biking, and other transportation purposes . . . imposes no new burdens on the servient tenements and does not result in the "substitution of a different servitude from that which previously existed."

App. 49. Prior Maryland law, in contrast, treated walking and railroading as fundamentally different activities:

> That a railroad corporation has no power or right to grant an easement like this, of footways for persons to walk along their tracks or by the side of them, seems an almost self-evident proposition. It is obvious that if such power existed and were exercised it would be subversive of the very purposes for which railroad charters are granted.

Sapp v. Northern Central Ry. Co., 51 Md. 115, 124-25 (1879). *See also Preseault*, 100 F.3d at 1542-43 & 1554 ("Realistically, nature trails are for recreation, not transportation."). Moreover, prior Maryland cases held additional uses of an easement to be additional servitudes, unauthorized by the easement. *See, e.g., Baltimore Co. W. &*

Elect. Co. v. Dubreuil, 105 Md. 424, 430-32, 66 A.2d 439, 441-42 (1907); *Canton Co. v. Baltimore & Ohio R. Co.*, 79 Md. 424, 432-33, 29 A. 821, 823-24 (1894).[6] If adding an additional use to an existing easement is imposing a new servitude, *a fortiori*, substituting a different use for the original use imposes a new servitude.

The Maryland Court of Appeals, and thus the Federal Circuit by adopting the Maryland's court's opinion, has simply disregarded the expectations of the parties as of the time the easement was given, substituting the Maryland court's own view about the desirability of trail uses. In 1911, the Land Company gave an easement for a freight railroad that had already been in operation to its benefit for some 20 years. Hikers and bikers, regardless of the size of their knapsacks or saddlebags, would not have proven satisfactory carriers of coal for the Land Company's power plant or of bricks and lumber for its construction projects. However packaged, recent public policies favoring recreational trails cannot change the nature of the Land Company's property interest without taking that interest.

IV. The Federal Circuit Did Not Apply Established Maryland Abandonment Law

To reach its result, the Federal Circuit had to rule against the Land Company on both the scope of use and abandonment issues. Under Maryland law, the combination of a cessation of use of the property and evidence of an intent

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[6] *See also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 429-30 (1982) (discussing *Western Union Tel. Co. v. Pennsylvania R. Co.*, 195 U.S. 540, 570 (1904), which treated stringing telephone lines over a railroad right of way as a taking).

to abandon operates as an abandonment "without any reference whatever to time." *See, e.g., Maryland & Pa. RR Co. v. Mercantile-Safe Deposit & Trust Co.*, 224 Md. 34, 39-40, 166 A.2d 247, 250 (1960); *Cityco Realty Co. v. Philadelphia, Balt. & Wash. RR*, 158 Md. 221, 226, 148 A. 441, 443-44 (1930). Accordingly, if the Railroad abandoned the easement prior to its December 16, 1988 quitclaim to Montgomery County, then no easement was conveyed to Montgomery County. Montgomery County's subsequent plans to make a recreational trail use of the property cannot revive a no longer existent easement and cannot provide a basis to avoid a taking of Petitioner's property.

The Railroad ceased using the easement on May 10, 1985. Petitioner contends that the abandonment was complete at that time, based on earlier actions of the Railroad evidencing the Railroad's intent, or, at the latest, on July 22, 1985, when the Railroad adopted a resolution of abandonment. The Court of Federal Claims found that abandonment occurred on April 9, 1986, when the Railroad filed an application for abandonment with the ICC, which stated: "[a]pplicants have not considered any alternative to the proposed abandonment." App. 173. Judge Cathell felt that all those things, plus the ICC's approval of abandonment, which occurred on February 25, 1988, rendered this case "a classic example of abandonment." App. 92. Because Judge Cathell felt the abandonment issue was so clear, he did not find it necessary to detail his reasons for disagreeing with the scope of use holding. *Id.* at 102.

It is not apparent that the Federal Circuit appreciated that scope of use alone was not an adequate ground to rule for the government. At page 5 of its opinion, it purported to "accept" the Court of Appeals answers to all the certified questions, including abandonment. App. 6. At page 6 of its

opinion, however, it disavowed the Court of Appeals ruling respecting abandonment, purporting to express no opinion on the disagreement between the majority and Judge Cathell.[7] It claimed: "We reach our decision on these appeals, as to the Land Company, on the state law ground that the original easement authorizes the current recreational trail use." *Id.*

A fair reading of the Federal Circuit's decision, therefore, is that it is entirely unsupported as to abandonment and, accordingly, wrong for assuming that easements under Maryland law can somehow be revived, post-abandonment, by a grantee under a quitclaim deed who decides to institute a use found to be within the original scope of the easement. *See Public Service Comm'n v. Philadelphia B. & W. RR Co.*, 122 Md. 438, 444, 89 A. 726, 728 (1914) (holding that the Maryland Public Service Commission had no power to order, in 1911, a railroad to resume operation over a line abandoned in 1897).

An alternative reading of the Federal Circuit's decision (inconsistent with its own statement about its basis for ruling against the Land Company) is that it accepted the aspect of the Maryland Court of Appeals opinion that abandonment evidence had to negate all permissible uses of the easement, including recreational trail uses. Such a holding, however, ignores that the only use of the property made by the Railroad was a railroad use.

Maryland law has never required proof of abandonment of hypothetical uses. The test for abandonment has always been:

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[7] The Federal Circuit also never addressed the reasoning that led the Court of Federal Claims to find an abandonment.

> A cesser of the use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect as an express release of the easement, without any reference whatever to time.

Vogler v. Geiss, 51 Md. 407, 410 (1879). The only use that could be "ceased" was the use the Railroad was making of the property. All the Railroad's acts indicated that it intended to abandon the right to that use. There was no evidence that it intended to substitute some other use, let alone a recreational trail use.[8] There was thus no easement left for Montgomery County to buy, regardless of the hypothetical scope of the easement and regardless of the County's intentions.

Neither the Maryland Court of Appeals majority nor the Federal Circuit cited a Maryland case in which a property owner, in order to show abandonment, was required to produce evidence of an intention to abandon uses that had never commenced. No such case exists. Such a test is impossible to satisfy. Nor did either court try to reconcile their holdings with the prior Maryland railroad abandonment cases, which had found easements to be abandoned based on abandonment of railroad use, even where other uses were either permitted or not expressly excluded. *See D.C. Transit System, Inc. v. State Roads Comm'n*, 265 Md. 622, 290 A.2d

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[8] The Railroad, as a precondition to quitclaiming its interest to Montgomery County, obtained assurance that it would never, under any circumstances, again become responsible for the property. JA 700 ("Seller shall have no further interest in the Property . . . and in no event shall Seller be entitled or obligated to enter upon the Property or resume common carrier operations thereon.").

807 (1972) ("*D.C. Transit II*");[9] *East Washington Ry. Co. v. Brooke*, 244 Md. 287, 294, 223 A.2d 599, 603 (1966) (conveyance of a parcel of land, "Being a strip of land sixty feet in width . . . as now located and used for railroad purposes"); *Maryland & Pa. RR Co. v. Mercantile-Safe Deposit & Trust Co.*, 224 Md. 34, 39-40, 166 A.2d 247, 250 (1960) (easement acquired by adverse possession); *Hodges v. Owings*, 178 Md. 300, 13 A.2d 338 (1940) ("strip of land sixty-six feet in width"); *United States v. 1.44 Acres of Land*, 304 F. Supp. 1063, 1070 (D. Md. 1969) ("right of way for its chartered purposes"). Those cases are inconsistent with both courts' abandonment rulings.

Under the Maryland law as it stood prior to the July 29, 1999 ruling on certified questions, the Petitioner had abundant evidence of abandonment. As Judge Cathell put it:

> [I]n the present case at bar . . . *no* evidence exists of anything other than an intent to abandon.
>
> . . . . There was simply nothing more the railroad could do to prove abandonment. It used every means short of the Goodyear Blimp to announce its intent to abandon.

App. 98-99 (emphasis in original). If the Maryland Court of Appeals, in 1999, wished to remake the test for abandonment under Maryland law, that can clearly not be treated as a

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[9] The conveyance was "for a right of way and such other purposes as said Railway is authorized" under various laws, including the general incorporation law and laws authorizing erection of buildings. *See D.C. Transit System, Inc. v. State Roads Comm'n*, 259 Md. 675, 679-80, 270 A.2d 793, 795-96 (1970).

"background principle" of state law, sufficient to deprive Petitioner of its property without compensation.

CONCLUSION

This Court should issue a writ of certiorari to the United States Court of Appeals for the Federal Circuit and clarify whether the "background principles" of state law that define property interests for takings purposes include new principles created for the purpose of defeating taking claims.

July 3, 2000

Respectfully submitted,

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